

No. 2670

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SACRAMENTO VALLEY ELECTRIC RAILROAD
COMPANY (a corporation),

Plaintiff in Error,

vs.

TAGGART ASTON,

Defendant in Error.

PETITION FOR A REHEARING ON BEHALF OF PLAINTIFF IN ERROR.

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Filed this day of October, 1916.

Filed

FRANK D. MONCKTON, Clerk.

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F. D. Monckton,
Clerk.

Deputy Clerk.

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*To the Honorable William B. Gilbert, Presiding
Judge, and the Associate Judges of the United
States Circuit Court of Appeals for the Ninth
Circuit:*

A rehearing is requested in this case for a failure of the court to consider a vital fact. We shall make it entirely apparent that the court did not consider this fact, although it is disclosed by the record. The court in no way refers to this fact in its statement of the case. The fact is vital under the very principle which this court impliedly

upholds in the first part of its opinion. The fact requires a reversal of this case. That the relevancy of this fact may appear, it should be stated:

The plaintiff in error, Sacramento Valley Electric Railway Company, was sued by defendant Taggart Aston upon a contract for services as an engineer to determine the cost of construction and the probable traffic returns of a railroad which defendant had been organized to construct between Dixon, in Solano County, to Red Bluff, in Tehama County, California. It was alleged in one count of the complaint that the contract was made; that it was agreed \$3500 should be paid for the services; that the contract was performed in part and then repudiated; that \$150 had been paid plaintiff on account and plaintiff was entitled to \$3350 damages. In another count it was alleged that for services rendered by plaintiff as an engineer the defendant was liable to plaintiff in the sum of \$3500, the reasonable value of such services less the sum of \$150 paid on account. The findings of the court were in plaintiff's favor on the first count, and judgment went in his favor for \$2350, it being found by the court, however, that the condition under which one installment of the contract of \$1000 was payable was never fulfilled. It appeared the defendant company was considering the sale of its bonds which it desired to sell to raise money with which to construct its road and it was claimed the report to be prepared by Aston was to be used by one Wilsey in selling these bonds in Europe.

In addition to the defense that the contract was not made, defendant interposed the defenses:

1. The orders of the railroad commission of the State of California, authorizing the sale of the stock imposed conditions against the use of the proceeds of the sales of stock which conditions had not been fulfilled.

2. The Public Utilities Act of the State of California was equally prohibitive if there was no prohibition in the orders referred to.

This court has taken up and disposed of the first point made. It was possible, though we still think not reasonable, for the court to analyze the orders in question and declare they did not apply to contracts of the kind in question. But the court in going further and in approaching the second point, declared there was nothing in the statute which prohibited the contract in question. *But the court clearly overlooked the vital fact which had made admissible the orders in question, that is, the property and funds of the corporation defendant were proceeds of the sale of its stock.*

Not one line, not one word of the concluding paragraph of this court's opinion refers to this vital fact although we most earnestly insisted in our briefs that this fact was vital and pointed out and printed the testimony in support of it. We ask this rehearing in no formal spirit. We ask it because we believe we are in the right and because the court has omitted to note a fact that is abso-

lutely controlling. It attributed to Mr. Huston a statement he never made, but the correction of this error is not the purpose of this petition, although the error will be referred to later in this petition.

The plaintiff's own testimony showed the facts which made the orders in question relevant. It showed a contract made and payable when the company was as yet but selling stock. It showed the only source from which the alleged contract could be met when and as agreed was out of the proceeds of stock sales; that the company's only property was proceeds of stock sales. The court absolutely overlooks this fact. Yet because of this fact, and solely because of it, the orders in question were admissible. It was solely because of this fact that we sued out the writ of error and we most earnestly ask a consideration of it.

That we may have before the court with unqualified clearness the facts and the statute and the only words of the court's opinion leading to an adverse ruling because of failure to note this fact, we print here on one side the testimony and the law applicable and on the other side the statement of this court referred to.

TESTIMONY AND PROVISIONS
OF STATUTE.

"A. C. Huston further testified on his cross examination:

'Mr. BLAKE. Q. At the time that this order was made, their (referring to the

STATEMENT OF COURT IN
REGARD TO STATUTE.

There having been no apparent purpose in the commission to prevent the railroad company from making such a contract for services preliminary to construction

company, defendant) only source of income from any quarter was the sale of this stock?

A. That was the only source of income we (referring to the company, defendant) have ever had.'

A. C. Huston further testified on his redirect examination:

'Mr. CLARK. Q. Some reference was made to a sum of \$750,000 in the treasury before the company could proceed to do certain work or incur certain obligations; was that \$75,000 in the treasury from the source designated in the commission's order?

A. We never have had that amount at any time.' "

(Tr. p. 90.)

(b) * * * No public utility shall without the consent of the commission, **apply** the issue of any stock or stock certificate, or bond, note or other evidence of indebtedness, or any part thereof, or any **proceeds** thereof, to any purpose **not specified in the commission's order** or to any purpose specified in the commission's order in excess of the amount authorized for such purpose, or issue or dispose of the same on any terms less favorable than

as is here sued upon, the plaintiff properly prevailed, unless the law itself forbade the contract. The statute, however, makes no declaration that a contract between a public utility and an engineer for work appropriately connected with preliminary matters is void without an order of the commission authorizing the same. With unmistakable certainty stock, stock certificates, bonds, notes or other evidences of debts issued without an order of the commission shall be void; but notwithstanding the far-reaching power of the commission as upheld in *Pacific Telephone etc. Co. v. Eshleman*, 166 Cal. 640, after careful examination of the several provisions of the act they fail to satisfy us that it was the intent of the law that the courts should refuse to enforce a contract which has not direct relation to stocks, bonds, and other evidences of debt, and which we cannot find is included in the meaning of the prohibitory terms of the statute. *Fackler v. Ford et al.*, 24 How. 322.

It being our conclusion that the contract with plaintiff for services was not be-

those specified in such order,
or a modification thereof.

* * * * *

(e) Every public utility which directly or indirectly, issues or causes to be issued any stock or stock certificate, or bond, note or other evidence of indebtedness, in non-conformity with the order of the commission authorizing the same, or contrary to the provisions of this act, or of the constitution of this state, or which **applies** the *proceeds from the sale thereof*, or any part thereof, to any purpose **other than** the purpose or purposes specified in the commission's order, as herein provided, * * *

is subject to a penalty of not less than five hundred dollars nor more than twenty thousand dollars for each offense.

(f) Every officer, agent or employee of a public utility, and every other person * * * who, directly or indirectly, knowingly applies or causes or assists to be applied the proceeds or any part thereof, from the sale of any stock or stock certificate, or bond, note or other evidence of indebtedness, to any purpose **not** specified in the commission's order, * * * shall be guilty of a felony."

Cal. Stats., Ex. Sess. of
1911, pp. 46, 47, 48.

yond the power of the corporation, the District Court was right in its judgment.

Affirmed.

Your Honors have held that the orders invoked and which provided that liability should not be incurred until certain moneys were on hand and which required that contracts calling for expenditure in excess of \$1000.00 should be submitted to the commission, related merely to construction work. The alleged contract called for the payment of a sum in excess of \$1000.00, it was never submitted to the commission in any way and the company never had on hand the \$750,000 named in the commission's orders, and, had the court held that the order related to contracts other than construction contracts, that would have made an end of this case. Your Honors held that the alleged contract did not relate to construction and reached the conclusion the orders did not prohibit the contract. Your Honors then failed to note that what the orders do not permit is prohibited by statute. That while the orders may prohibit certain acts and impose conditions when a stock issue is authorized, yet if no order is made or condition imposed as to the use of proceeds of the stock, it may not be used by the company. The provisions of the order to which the court's opinion is addressed, are as follows:

"Proper provision, however, may be made for the conditional acquiring of said rights of way in exchange for said common stock pending final consummation of such exchange. Construction of the road shall not be entered upon nor liability created, nor money paid out except for commissions as aforesaid until there shall be in the hands of the company from the sale of stock \$750,000."

* * * * *

“And in addition thereto said company shall submit to this Commission for its approval the form of all contracts for the sale or exchange of stock and before the execution thereof all contracts for grading, bridging, track, including materials and labor, equipments of all kinds and all materials, labor and property involving costs in excess of \$1000.”

Tr. pp. 65, 66.

With all the earnestness with which we can speak, we wish to point out that there is nothing in the Public Utilities Act that concerns itself with the expenditure of property of a public utility that is not proceeds of sales of stock. We never for a moment contended and it has never been contended that the railroad commission of California may make orders dealing with the expenditure of property of a public utility that is not made up of proceeds of stock. It is a striking fact that your Honors have treated, and that Judge Van Fleet treated, as relevant, the orders of the railroad commission which you have discussed at length, when there is not conceivable any ground for urging the applicability of those orders unless we are dealing with a company whose project was conceded to be in a formative state and whose funds were proven to be, in the eye of the statute, trust funds subject to the dominion of the railroad commission. Aston's payments were to begin in a week and the only funds were what the company was getting for stock.

In the face of the fact to which we have now called to the court's attention, let us analyze the

last paragraph of this court's opinion. Your Honors say:

"There having been no apparent purpose in the commission to prevent the railroad company from making such a contract for services preliminary to construction as is here sued upon the plaintiff properly prevailed, unless the law itself forbade the contract. The statute, however, makes no declaration that a contract between a public utility and an engineer for work appropriately connected with preliminary matters is void without an order of the commission authorizing the same. With unmistakable certainty, stock, stock certificates, bonds, notes or other evidences of debts issued without an order of the commission shall be void; but notwithstanding the far-reaching power of the commission as upheld in *Pacific Telephone etc. Co. v. Eshleman*, 166 Cal. 640, after careful examination of the several provisions of the act they fail to satisfy us that it was the intent of the law that the courts should refuse to enforce a contract which has not direct relation to stocks, bonds, and other evidences of debt, and which we cannot find is included in the meaning of the prohibitory terms of the statute. *Fackler v. Ford et al.*, 24 How. 322."

In other words your Honors leave out of your summary of subjects over which jurisdiction is conferred, the words "proceeds of the stock disposed of", although the statute, in terms as clear as English language can express thought, has included the disposition and use of such proceeds within the jurisdiction of the railroad commission and conferred upon it exclusive authority in regard to the same. Where does this court get "with unmistak-

able certainty" the conclusion that the railroad commission must permit a stock issue and specify the purpose thereof? Where does this court get "with unmistakable certainty" the conclusion that the commission must permit a bond issue by a public utility? There is no foundation for any such conclusion in any part of the statute except in section 52, subdivisions (a) and (b) thereof, which provisions we have invoked. Yet your Honors have absolutely failed to note the concluding part of subdivision (b) of section 52, which we have quoted and shall again quote herein. With precisely the same "unmistakable clearness" with which the legislature of the State of California said that a share of stock or bond of a public utility should not be issued without the consent of the railroad commission, it said that the proceeds of stock were a trust fund which should be held to abide the orders of the railroad commission; that until, or if there was no order of the commission, the expenditure of those proceeds was illegal and a crime.

True the law says that in permitting sales of stock the commission may impose restrictions on the use of the proceeds, but the statute went further and in a later clause expressly declared that such proceeds must not be expended without the commission's consent. Your Honors did not decide this case.

"No public utility shall without the consent of the commission, **apply** the issue of any stock or stock certificate, or bond, note or other evidence of indebtedness, or any part thereof, or

any **proceeds** thereof, *to any purpose not specified in the commission's order*, or to any purpose specified in the commission's order in excess of the amount authorized for such purpose, or issue or dispose of the same on any terms less favorable than those specified in such order, or a modification thereof."

* * * * *

Does this court find anything unmistakable about the words "No public utility"? Do not the words comprehend the defendant which was organized after the act was passed and which it was conceded was subject to the act? Is there anything unmistakable about the words "without the consent of the commission"? Do the words mean or do they not mean that a prohibition exists in the absence of any order? Could language be clearer than the words which follow:

"**apply** the issue of any **stock** * * * or any **proceeds** thereof to any purpose **not** specified in the commission's order".

It was entirely a mistake to say that Mr. Huston declared that he was of the opinion that the statute did not prohibit this alleged contract. There is no such statement by Mr. Huston at any place in the record. Mr. Huston did point out that the commission's orders left it uncertain as to whether the company could pay its general expenses and that an informal consent to the payment of these expenses was obtained. But never for an instant did he concede that the statute, as regards the alleged Aston contract, was inoperative. On the contrary, he testified repeatedly that he told Aston the com-

pany would make no contract with him until the railroad commission had given its approval and the substance of this testimony is set out in the record:

“Defendant offered evidence in substance and effect that at the meeting of the board of directors on September 20, 1913, it was stated on their behalf that no contract would be made with the plaintiff, unless it was approved by the Railroad Commission and that the meeting adjourned without the giving of assent to any proposition and with the understanding that Mr. Wilsey was to come from Portland to San Francisco to meet the board and that any proposition for the sale of the company's bonds or for the employment of plaintiff was to be taken up at the next meeting of the board; that it was not stated that any committee or members of the board would act for the board in making a contract with plaintiff, but plaintiff denied that any such statements were made in his presence. The defendant further offered evidence to the effect that, at the time the document, Plaintiff's Exhibit 3, was signed, it was stated by Mr. Sisson and Mr. Manor that it expressed what they would be willing to agree to if the Railroad Commission approved such a contract, but this was denied by the plaintiff.”

Tr. pp. 28, 29.

How any remark of Mr. Huston's found in the record could be given the interpretation placed upon it by this court, we fail to understand. Nor, as shown by the Texas cases cited in our opening brief, could one violation of the statute justify another violation.

To allow the last paragraph of this court's opinion to stand would be a burial and not a decision in view of the omitted fact of the case to which we have referred. We have contended and do still contend that the judgment was most unjust. Whatsoever the ultimate ruling of the court may be, we most respectfully urge that we are entitled to a decision upon the facts and that it is absolutely clear that this court has not as yet decided the case upon the facts. It did proceed to declare its opinion regarding the Public Utilities Act. It did declare an interpretation of that act, but its declaration was utterly foreign to a specific and vital fact of this case. If this is not a case for a rehearing,—if when a court has decided a case without considering uncontradicted and controlling evidence a rehearing may not be had—then the privilege of applying for a rehearing is futile and so is the privilege of defending any case.

We plead with this court to note the fact that the statute prohibited the expenditure of this company's funds even if the order of the commission did not. Your Honors have looked through the commission's orders to see what they said about expenditures. You have said those orders did not prohibit the company's making the payments to Aston out of its funds and there you have stopped. You have concluded with a general statement regarding the statute, utterly failing to note the fact that the law which gave rise to the orders and compelled your decision as to the scope thereof,

declares that if there is no order of the commission, and the proposed expenditure is from proceeds of stock, the statute alone prohibits. You have first assumed that orders of the railroad commission of the State of California may have some force, and that the orders in this case were entitled to your consideration and then failed to note that the only fact which can give vitality or power to an order of the railroad commission relating to expenditures is the fact that the expenditure calls for the use of proceeds of sale of stock. Your Honors have overlooked the fact that if in the order permitting sales of stock prohibitions are not attached to the use of the proceeds of the sale, the statute says that until the commission grants its permission an expenditure can not be made.

If there is any one thing that the statute of the State of California made plain it was this,—that until the railroad commission of that state acted, proceeds of sales of stock could not be obligated by any contract the company might make. That is as plain as daylight. No court's judgment was made the substitute for the commission's judgment but the power and the duty was imposed upon the commission of determining for what purposes proceeds of sales of stock of the company might be used. If the court's decision could be said to be a decision that the railroad commission has not this power, we would have a decision determining "yes" to be "no".

"No public utility shall without the consent of the commission, **apply** the issue of any stock

or stock certificate, or bond, note or other evidence of indebtedness, or any part thereof, or any **proceeds** thereof, *to any purpose not specified in the commission's order*, or to any purpose specified in the commission's order in excess of the amount authorized for such purpose, or issue or dispose of the same on any terms less favorable than those specified in such order, or a modification thereof."

* * * * *

If this be the law and it clearly is, what does it mean? Does it mean that the railroad commission has been given a discretion and yet its exercise may be subordinated to the judgment of a jury in Modoc County and to a different judgment of a different jury in San Diego County? Does it mean, that the parties, without exercising the precaution of having their contracts involving the proceeds of sale of stock of a public utility approved, can come into this or any other court and say the contract was such that it ought to be approved and therefore the money paid into a public utility on the faith that it would be expended upon orders of the railroad commission of the State shall be expended upon orders of the court. Is any such utterly absurd and meaningless interpretation to be given to a statute which has been treated elsewhere and which is regarded in this state as an important piece of constructive legislation and as meaning something. Does the act mean to "Tom," "Dick" and "Harry" who hand over their money to the stock salesman of a public utility that their money will

not be expended unless the railroad commission consents or does it mean nothing? Do the words:

“No public utility shall without the consent of the commission, **apply** the issue of any stock or stock certificate, or bond, note or other evidence of indebtedness, or any part thereof, or any **proceeds** thereof, *to any purpose not specified in the commission’s order*, or to any purpose specified in the commission’s order in excess of the amount authorized for such purpose, or issue or dispose of the same on any terms less favorable than those specified in such order, or a modification thereof.”

* * * * *

mean something or do they mean nothing? Can this court or any court say that because it feels the particular expenditure was necessary or appropriate, therefore it should be made. Can this court or any court lawfully say that it is just as competent and expert as the railroad commission to pass upon every intricate question arising in the disbursement of the first funds of a public utility? Can it say this as a matter of law and prejudge the matter? It is obvious that neither this court nor any other court has any such power.

We desire again to point out the federal cases wherein the Circuit Court of Massachusetts and the Circuit Court of Appeals of the First Circuit declined to permit a court’s judgment to be substituted for that of a railroad commission, where, by contract and under a similar statute, it was

obvious that the proposed contract was within the jurisdiction of the railroad commission.

Augusta Trust Co. v. Federal Trust Co.,
140 Fed. 930;

Augusta Trust Co. v. Federal Trust Co.,
153 Fed. 157, 160.

And the Massachusetts Act is the act on which our statute was patterned. It has prohibitory language like our statute. It says:

“ * * * the corporation shall not apply such proceeds otherwise than as specified in such order or orders.”

Buckley v. N. Y. N. H. & H. R. Co., 216 Mass.
432; 103 N. E. 1033

It is now absolutely settled practice in the State of California for the railroad commission to exercise the jurisdiction in question.

“It is the duty of the Commission to see to it that stocks, bonds and other securities of such utilities are issued only for the purposes authorized by law *and the proceeds thereof are applied only to the purposes* and in the amounts specified in the Commission’s order” etc.

In re Tidewater Southern Ry. Co. Bond Issue, Vol. 1, Opinions and Orders of Railroad Commission of California, 624, 625.

We have shown to this court of what defendant’s property consisted. We have shown to this court that plaintiff’s own testimony proved of what it consisted. We showed the plaintiff knew, and it was not denied that plaintiff knew, of the statute

in question, and that he acted with knowledge of the statute and we earnestly insist that he should not be permitted to defy it, and that the court should grant the plaintiff in error a rehearing in this case.

Dated, San Francisco,

October 28, 1916.

Respectfully submitted,

A. C. HUSTON,

BLACK & CLARK,

*Attorneys for Plaintiff in Error
and Petitioner.*

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for plaintiff in error and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

GEO. CLARK,

*Of Counsel for Plaintiff in Error
and Petitioner.*